

**BEFORE THE MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Proceeding by the Department of Telecommunications	)	
And Energy on its Own Motion to Implement the	)	
Requirements of the Federal Communications	)	D.T.E. 03-60
Commission's Triennial Review Order Regarding	)	
Switching for Mass Market Customers	)	

**JOINT COMMENTS OF  
BROADVIEW NETWORKS, INC.; BULLSEYE TELECOM, INC.;  
INFOHIGHWAY COMMUNICATIONS CORPORATION; MCGRAW  
COMMUNICATIONS, INC.; METTEL; TALK AMERICA INC.; AND Z-  
TEL COMMUNICATIONS, INC.**

Broadview Networks, Inc.; Bullseye Telecom, Inc.; InfoHighway  
Communications Corporation; McGraw Communications, Inc.; MetTel; Talk America Inc.; and  
Z-Tel Communications, Inc. (referred to herein collectively as the "Joint Commentors"), by their  
undersigned counsel, hereby provide their comments in response to the Massachusetts  
Department of Telecommunications and Energy's ("Department's") August 26, 2003 Notice of  
Investigation in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION**

In its Notice of Investigation, the Department seeks comment on the scope, nature  
and timing of the Department's proceeding to implement the impairment analysis for local  
switching for mass market customers, as directed by the Federal Communications Commission  
("FCC") in the Triennial Review Order ("TRO").<sup>2</sup> Additionally, the Department requests

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<sup>1</sup> *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers*, Notice of Investigation, D.T.E. 03-60 (Aug. 26, 2003).

<sup>2</sup> Notice of Investigation, 1; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications*

comment on whether this proceeding should be conducted as an “adjudicatory proceeding” under MASS. GEN. LAWS. ch. 30A, § 1(1) or another type of proceeding whereby the Department plays more of a consultative role.<sup>3</sup>

As described in the paragraphs below, the Joint Commenters submit that the Department should immediately begin a nine-month impairment analysis for local switching for the mass market and restrict such proceeding to only those issues that directly relate to the provision of competitive telecommunications service to Massachusetts mass market customers via the Unbundled Network Element Platform (“UNE-P”). Furthermore, the Joint Commenters propose that the Department conduct this proceeding as an adjudicatory proceeding under MASS. GEN. LAWS. ch. 30A, § 1(1).

## **II. THE DEPARTMENT SHOULD CONDUCT A NINE-MONTH IMPAIRMENT ANALYSIS DEDICATED TO LOCAL SWITCHING FOR MASS MARKET CUSTOMERS**

In the TRO, the FCC concluded that competitors are impaired without access to unbundled local circuit switching in the mass market.<sup>4</sup> Although the FCC made a national finding of impairment for local circuit switching used to serve the mass market, the FCC directed the state commissions, including the Department, to apply a series of detailed analyses to determine on a granular level whether CLECs are impaired without access to local switching to serve the mass market in sub-state geographic areas ultimately defined by this Department.<sup>5</sup>

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*Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003).*

<sup>3</sup> Notice of Investigation, 1.

<sup>4</sup> TRO, ¶ 459.

<sup>5</sup> *Id.*, ¶ 460.

Due to the numerous specific steps that the Department must undertake in this impairment analysis, including defining the relevant market,<sup>6</sup> applying the FCC switch triggers,<sup>7</sup> considering potential deployment of circuit switching in mass markets,<sup>8</sup> and other related complex issues, such as nondiscriminatory access to a combined voice and data service (*i.e.*, Line Splitting),<sup>9</sup> the Department should address local switching in the mass market in a separate and distinct proceeding from other TRO issues.

The inquiry related to unbundled local circuit switching for the mass market is logically distinct from the other TRO implementation issues. As such, the Department should avoid the inclusion of issues not directly related to local switching to serve the mass market, such as batch-cuts<sup>10</sup> and the availability of loop/transport UNEs. Analysis of other TRO issues, although restricted by the same nine-month deadline, will present a different set of issues and potentially affect a separate set of carriers than those affected by local switching for the mass market. Therefore, the Department should maintain a limited scope for this proceeding and only address those issues that directly affect UNE-P carriers providing service to mass market customers in Massachusetts.

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<sup>6</sup> *Id.*, ¶¶ 495-96.

<sup>7</sup> *Id.*, ¶¶ 501-05.

<sup>8</sup> *Id.*, ¶¶ 511-21.

<sup>9</sup> *Id.*, ¶¶ 251-52.

<sup>10</sup> To be perfectly clear, the Joint Commenters submit that the Department's development of the batch cut process should be conducted separately from the nine month mass market impairment proceeding for unbundled local circuit switching. In developing a batch cut process, the Department is directed to make a series of discrete findings, distinct from this Department's impairment analysis regarding mass market for unbundled local circuit switching. Any reasonable review of the specific areas of inquiry outlined by the FCC demonstrate that the development of a batch cut process is separate from mass market impairment analysis for unbundled local circuit switching. Moreover, only after a batch cut process is developed, tested, operationally implemented, and utilized under mass market conditions and volumes will it be possible to evaluate the extent to which it mitigates existing impairment in the mass market.

### **III. THE COMMISSION SHOULD CONDUCT THE NINE-MONTH INVESTIGATION INTO LOCAL SWITCHING FOR MASS MARKET CUSTOMERS AS AN ADJUDICATORY PROCEEDING**

Parties interested in the Department's investigation into local switching for mass market customers would be best served by an adjudicatory proceeding. As defined under the Massachusetts General Laws, an adjudicatory proceeding means "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing...."<sup>11</sup> The Joint Commenters recommend that due to the critical nature of the availability of local switching to serve mass market customers, the Department must allow for an agency hearing where interested parties may conduct discovery, present their evidence, and cross examine witnesses on the record. The TRO requires each state commission to engage in several lines of inquiry within its nine-month mass market local switching proceeding. In an adjudicatory proceeding, all interested parties would be afforded an opportunity to fully explore and present evidence in each of these areas.

The Department should assume the role of adjudicator, as opposed to a consultative role, as the FCC expressly delegated to this Department the responsibility of defining geographic markets and making ultimate impairment decisions regarding use of unbundled local circuit switching for mass market consumers. By contrast, a consultative role (such as that used in section 271 proceedings) suggests that some agency other than this Department would be responsible for making unbundled local circuit switching impairment decisions for the mass market. Accordingly, an adjudicatory proceeding is the appropriate vehicle for making mass market switching determinations.

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<sup>11</sup> MASS. GEN. LAWS. ch. 30A, § 1(1).

#### IV. CONCLUSION

Consistent with the foregoing, the Joint Commenters submit that the Department should immediately begin the nine-month proceeding for local switching for the mass market and restrict the proceeding to only those issues that directly relate to the provision of competitive telecommunications service to Massachusetts mass market customers via UNE-P. Furthermore, the Joint Commenters recommend that the Department conduct this inquiry as an adjudicatory proceeding under MASS. GEN. LAWS. ch. 30A, § 1(1).

Respectfully Submitted,



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DATED: September 16, 2003